STATE OF MICHIGAN

COURT OF APPEALS

ANIL SAKHUJA and EAST & WEST COMMODITIES,

Plaintiffs/Counter-Defendants-Appellants,

v

JOHN J. BIALEK, MERCY BIALEK, and JULIA BIALEK d/b/a THE HI-WAY MARKET,

Defendants/Counter-Plaintiffs-Appellees.

UNPUBLISHED
July 18, 2000

No. 212959
Wayne Circuit Court
LC No. 96-627997-CK

Before: Holbrook, Jr., P.J., and Kelly and Collins, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment of no cause of action entered against them in a suit brought to recover deposits paid in connection with plaintiffs' purchase of a liquor store from defendants. We affirm.

I

The trial court held that plaintiffs were not entitled to a return of their deposits because they breached the purchase agreement. Plaintiffs contend on appeal that the trial court's verdict was not supported by sufficient evidence. We disagree.

This Court reviews a trial court's findings of fact for clear error. *Bracco v Michigan Tech Univ*, 231 Mich App 578, 585; 588 NW2d 467 (1998). "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*, quoting *In re Forfeiture of $19,250*, 209 Mich App 20, 29; 530 NW2d 759 (1995). Appellate courts should give special deference to the trial court's findings when they are based upon its assessment of the witnesses' credibility. *Schultes Real Estate Co v Curis*, 169 Mich App 378, 385-386; 425 NW2d 559 (1988).

The outcome of this case depended on the credibility of the parties' testimony. The purchase agreement required plaintiffs to complete the sale and to obtain a liquor license, and provided that, if plaintiffs defaulted as to the conditions of the agreement, defendants had the option of declaring a forfeiture of the agreement and retaining plaintiffs' deposits. The agreement also provided that defendants were required to furnish title insurance and a tax history, and that in the event that defendants defaulted, plaintiffs were entitled to a return of their deposits. Therefore, the trial court had to determine who was in breach of the agreement based on the parties' testimony and the documents admitted into evidence. Leaving issues of credibility to the trial court, we find that the court's findings were supported by sufficient evidence and not clearly erroneous.

Plaintiff testified that he received correspondence from the liquor control commission that the property needed repairs, and that the agreement stated that plaintiffs had examined the property and purchased it "as is." Therefore, the trial court did not clearly err in finding that plaintiffs failed to diligently seek the transfer of the liquor license as required under the parties' agreement.

Furthermore, this Court defers to the trial court's finding that defendant John Bialek was a credible witness in testifying that plaintiffs actually had control of the business after January 17, 1995. Many of the documents introduced by plaintiffs contained the names of not only plaintiff Sakhuja but also two other men. The court could have reasonably found that, although Sakhuja was the sole shareholder of the plaintiff corporation, the three men were all authorized to participate in the transaction and operate the business on behalf of the corporation. The letter from the liquor control commission stating that it canceled the application to transfer the liquor license is dated nearly a year after plaintiffs took control of the business. The trial court could have reasonably concluded that defendants canceled the application as a result of plaintiffs' breach of the contract. Based on the evidence presented in this case, this Court is not left with a definite and firm conviction that a mistake has been made.

II

Prior to opening arguments, plaintiffs' counsel moved for a default judgment against one of the defendants as a result of her failure to appear at trial. The trial court denied plaintiffs' motion. Plaintiffs contend on appeal that the trial court erred in not entering default judgment against the defendant under MCR 2.506(F)(6). We disagree.

The interpretation and application of court rules presents a question of law that this Court reviews de novo. *Reitmeyer v Schultz Equipment & Parts Co, Inc*, 237 Mich App 332, 336; 602 NW2d 596 (1999). MCR 2.506(F) provides, "If a party or an officer, director, or managing agent of a party fails to attend or produce documents or other tangible evidence pursuant to a subpoena or an order to attend, the court may . . . enter judgment by default against that party." This Court has held:

> A party may be required to appear at trial if a properly issued subpoena or order from the court commands the appearance and failure to comply can result in default judgment. MCR 2.506. However, absent a subpoena or order from the court to appear, a defendant in a civil case is not required to appear in person for a scheduled trial. The record in this case does not reflect either the issuance of a subpoena or an

> order to appear. The unsigned, undated trial notice which was sent to defendant's attorney did not constitute an order appear. MCR 2.602(A). [*Rocky Produce, Inc, v Frontera*, 181 Mich App 516, 517-518; 449 NW2d 916 (1989).]

As in *Rocky Produce*, the lower court file and record in this case contain no subpoena or order from a court for the defendant to appear at the hearing in this case. See *id*. Although the file contains a signed and dated order setting the trial date, this order merely set the date for trial and did not order the parties to appear. The court rule clearly requires a subpoena or order to attend and not merely a notice of the trial date. See *id*. See also *Boggerty v Wilson*, 160 Mich App 514, 529-530; 408 NW2d 809 (1987) ("courts speak through their written orders"); *Cavanaugh v Cardamone*, 147 Mich App 159, 162; 383 NW2d 601 (1985) ("[t]here is no rule requiring a party to a suit to attend court during trial"). Therefore, based on the record, the trial court did not err in refusing to enter a default judgment against the defendant who failed to appear at the hearing in this case.

III

At the close of plaintiffs' proofs, they objected to defendants calling any witnesses because defendants had not filed a witness list. The court clerk verified that the file did not contain defendants' witness list. Defendants then released the witness they had planned to call and instead called one of the defendants to testify. Plaintiffs contend on appeal that the trial court erred in allowing the defendant to testify on defendants' behalf. We disagree.

Whether to permit a witness who is not disclosed in a witness list to testify is within the trial court's discretion and should not be reversed by this Court absent an abuse of discretion. *Jernigan v General Motors Corp*, 180 Mich App 575, 584; 447 NW2d 822 (1989). An abuse of discretion will be found when the decision is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

MCR 2.401(I) provides:

> (1) No later than the time directed by the court under subrule (B)(2)(a), the parties shall file and serve witness lists. The witness list must include:
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> (a) the name of each witness, and the witness's address, if known; however, records custodians whose testimony would be limited to providing the foundation for the admission of records may be identified generally;
>
> (b) whether the witness is an expert, and the field of expertise.
>
> (2) The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown.

> (3) This subrule does not prevent a party from obtaining an earlier disclosure of witness information by other discovery means as provided in these rules. [MCR 2.401(I).]

Plaintiffs argue that this rule is mandatory and that the trial court was required to prohibit the testimony of any witness on defendants' behalf in the absence of a showing of good cause for their failure to comply with the rule in a timely manner. However, this Court has held that trial courts have the discretion to allow a party to call a witness whose name is not contained on a witness list, and that courts have the discretion to allow a party to testify even after a witness list has been stricken or barred from being filed. See *Jamison v Lloyd*, 51 Mich App 570, 574-575; 215 NW2d 763 (1974); *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 629; 506 NW2d 614 (1993). In *Grubor Enterprises*, this Court reasoned that when the witness not noted in a witness list is a party to the suit, the element of surprise is not involved, and that if the party to the suit is the only witness, the sanction of not allowing the witness to testify in effect causes a dismissal of the case. *Grubor Enterprises*, *supra* at 628-629.

In *Dean v Tucker*, 182 Mich App 27; 451 NW2d 571 (1990), this Court held as follows:

> While it is within the trial court's authority to bar an expert witness or dismiss an action as a sanction for the failure to timely file a witness list, the fact that such action is discretionary rather than mandatory necessitates a consideration of the circumstances of each case to determine if such a drastic sanction is appropriate. . . . Among the factors that should be considered in determining the appropriate sanction are: (1) whether the violation was willful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the defendant, (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court's order, (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive. [*Id*. at 32-33 (citations omitted).]

In this case, although defendants apparently refused to comply with discovery in the past, it is clear that defendants would have been greatly prejudiced if the trial court had refused to allow one of the defendants to testify. This witness was defendants' only witness, without his testimony the case would necessarily have been dismissed in favor of plaintiffs. Furthermore, it is clear that plaintiffs had notice of the possibility that the defendant would be called as a witness because he was an adverse party and plaintiffs listed him on their own witness list. In addition, defendants' counsel stated at the hearing that he thought he had filed the witness list, which indicates that defendants did not intentionally refuse to comply with discovery. Under the circumstances, the trial court did not abuse its discretion in allowing the defendant to testify on defendants' behalf, despite their failure to file a witness list.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly
/s/ Jeffrey G. Collins